

IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:)
)
CHELSEA KAY MERTA,) Case No. SC100236
)
Respondent.)

RESPONDENT'S BRIEF

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RESPONDENT'S ADDITIONAL STATEMENT OF FACTS

Ms. Merta provides this additional statement of facts for completeness under Rule 84.04. Ms. Merta is satisfied with the accuracy of Informant's statement of facts. This additional statement of facts helps explain Ms. Merta's actions and provides context for her actions.

A. Introduction

The Information against Chelsea Kay Merta ("Ms. Merta") is based on the misappropriation of client and law firm data and violations of the Temporary Restraining Order ("TRO") which arose in a lawsuit, captioned, *Stange Law Firm, PC v Ms. Merta et al.*, Cause No. 18SL-CC00540, (the "Underlying Lawsuit") filed by the Stange Law Firm ("Stange") against Ms. Merta and her firm, Lotus Law and Legal Services, LLC ("Lotus Law"). R1-13 (A3-15).¹ Ms. Merta settled the Underlying Lawsuit with Stange, the terms of which she has fully satisfied. T10, R69 (A79); R220-24.²

At the time Ms. Merta left the Stange on February 9, 2018, she had been practicing law for just over three years. R46 (A33). When she left, she took client files without written

¹ The record on appeal (R) will be cited by page number, e.g., R33. The consecutively paginated transcript (T) will be cited by page number, e.g., T40. Exhibits to the Stipulation (Ex) will be cited by number, e.g., Ex5. For record materials included in Informant's Appendix (A), a parallel page citation will be included parenthetically, e.g., T30, R89 (A99).

² All citations to testimony are to testimony before the Disciplinary Hearing Panel (DHP) on June 26, 2023.

consent from the clients or from Stange. R34 (A21). Specifically, she copied files to a USB flash drive (the “Flash Drive”) a week before she resigned. R34 (A21). Ms. Merta did not take the files to gain an unfair advantage. R45 (A32). She took them because she knew that Stange did not always cooperate with departing lawyers to turn over files for clients who decided to continue to be represented by the departing lawyer. T23, R82 (A92).

Within 48 hours of leaving Stange, about 19 of Ms. Merta’s approximately 21 clients provided written permission to remain with Ms. Merta at her new practice. T26, R85 (A95). Ms. Merta believed that by taking the client files, she was protecting her clients, given that in the three weeks that followed her departure, Ms. Merta had depositions scheduled, an order of protection hearing, and court settings and settlement conferences for which she needed her files to prepare. T23, R82 (A92). Ms. Merta now recognizes that she violated the rules of professional responsibility by not first obtaining the clients’ and Stange’s permission, and she fully appreciates the problems she caused. T24, R83 (A93).

Within days of Ms. Merta’s departure on February 9, 2018, Stange filed the Underlying Lawsuit against Ms. Merta for misappropriating client data. R3 (A5). Stange sought a temporary restraining order. R4 (A6). Ms. Merta retained her neighbor, Rob Schmittgens (“Schmittgens”), who was even less experienced than Ms. Merta, having graduated law school two years prior. T27, R86 (A96). Schmittgens consented to a temporary restraining order (the “TRO”), which the St. Louis County trial court entered on February 16, 2018. R159. Ms. Merta never saw the TRO before it was entered. T28, R87 (A97).

The TRO contained contradictions. For example, it provided that Ms. Merta was allowed to keep the file materials relating to the clients that decided to continue their cases with her, but it stated that she was not allowed to access or view the files for those clients. T29, R88 (A98). Further, under the TRO, Ms. Merta was simultaneously required to (1) return all Stange related files (except for clients that had already retained Ms. Merta as counsel and terminated their relationship with Stange) and (2) preserve all electronic, computer and paper records (including those being returned) constituting or containing Stange client-related files and/or information. R35, 37 (A22, 24). The TRO required that Ms. Merta return all Stange files no later than February 20, 2018. Ex2, R159-60.

The day the TRO was entered, Ms. Merta provided the Flash Drive to Schmittgens, to comply with the TRO. T30, R89 (A99). However, Schmittgens waited seven months before providing the Flash Drive to Stange's counsel on September 28th, 2018. T7, R66 (A76). Still, all the misappropriated data (all of which was contained on the Flash Drive) was returned to Stange before any motion for contempt was filed. R52 (A39).

Two motions for contempt followed, which resulted in two orders finding Ms. Merta in contempt. Ex3, R161-68; Ex9, R187-93. Based on the advice of her lawyers, Ms. Merta did not attend the contempt hearings. T32, R91 (A101); T37, R96 (A106).³ As a result, the trial court took adverse inferences against Ms. Merta, finding that she intentionally and

³ For example, Ms. Merta's lawyers advised her not to attend the July 9, 2019, hearing on the second motion for contempt because the trial court lacked jurisdiction at that time due to the automatic stay caused by Ms. Merta's bankruptcy proceedings. T37, R96 (A106).

willfully retained, and failed to return, all Stange documents, and that Ms. Merta transferred Stange data to cloud storage and changed her passwords for the purpose of hiding documents in advance of another motion for contempt. *See* Ex3, R161-68; Ex9, R187-93. Ms. Merta's lawyers did not file any written response to either contempt motion. The trial court never heard Ms. Merta's side of the story. R187.

B. Ms. Merta's Decision to Take Client Files

When Ms. Merta left Stange, she (1) wiped her work laptop and computer (2) and downloaded firm files to her Flash Drive. R40 (A27). Ms. Merta chose to wipe her devices because they contained personal login information. T22, R81 (A91). Former Stange attorneys and Stange's former tech director had advised Ms. Merta that, after another attorney left the firm, the founding partner went through that employee's social media accounts and personal emails. T22, R81 (A91). By wiping her laptop and computer, Stange did not lose any data because it kept all client data on its cloud server. T22, R81 (A91). Therefore, by taking the files, Ms. Merta did not prevent the Stange firm from representing any of its clients. T22, R81 (A91).

Ms. Merta was careless when she downloaded the files to the flash drive. She intended to take only client files for her existing clients. T23, R82 (A92). However, it was ultimately determined that the flash drive contained 22,000 files including documents relating to 79 client files. T6, R65 (A75); R163; R36 (A23). Ms. Merta testified that she was unaware she downloaded this additional firm and client information. T24-25, R83-84 (A93-94). She intended to save just the templates on that flash drive – *i.e.*, copies of

documents that had been filed with a court. T24, R83 (A93). She did not realize that the firm also stored other items in the computer folder named “templates.” T25, R84 (A94).

All but two or three of Ms. Merta’s clients came with her to her new firm, Lotus Law, which she started in February 2018 after leaving Stange. T26, R85 (A95); R34. Ms. Merta and Lotus Law were both defendants in the Underlying Lawsuit. T26, R85 (A95). Lotus Law primarily serves low-income clients, most of whom are referred to her by Arch City Defenders and Legal Services of Eastern Missouri. R47 (A34). Most of her clients cannot afford to pay her very much for her services, and many times she does not get paid. R47 (A34).

Ms. Merta took the client files because she knew from her own experience that Stange’s management “would go out of their way to prevent attorneys and their clients from accessing their files once their attorney departed.” T23, R82 (A92). In the three weeks that followed her departure, Ms. Merta had depositions scheduled, upcoming court settings including an order of protection hearing, and numerous settlement conferences for which she needed the client files to prepare. T23, R82 (A92).

C. Ms. Merta’s Efforts to Comply With The TRO

The TRO required that Ms. Merta:

- (1) Return any and all Stange related files except for documents specifically pertaining to clients that had already retained Ms. Merta as counsel and terminated their relationship with Stange no later than February 20, 2018, and

- (2) Preserve all electronic, computer and paper records (including those being returned) constituting or containing Stange client-related files and/or information.

Ex2, R159; R35-36 (A22-23). Further, the TRO enjoined Ms. Merta from “accessing, viewing and/or using” any of the files. Ex2, R159; R35-36 (A22-23). The prohibition on accessing, viewing and/or using files extended to files pertaining to the clients that had decided to retain Ms. Merta as counsel, an apparent contradiction. *See* Ex2, R159; R35-36 (A22-23).

On February 16, 2018, the same day Ms. Merta received a copy of the TRO from her first retained counsel, Schmittgens, she walked over to his apartment and hand-delivered the Flash Drive. T30, R89 (A99). Ms. Merta expected that Schmittgens was going to comply with the TRO, meaning that “he was going to turn it over to Stange so they could get whatever information that they needed.” T30. R89 (A99).

On February 20, 2019, in response to the TRO, Schmittgens initially returned files for four clients to Stange. T7, R66 (A76), R35 (A22). On February 22, 2018, Schmittgens provided Stange with hundreds of pages of law firm-related documents. Four months later, on June 14th, 2018, Schmittgens informed Stange’s counsel that he had Ms. Merta’s Flash Drive containing additional Stange files. T7, R66 (A76). Another three months passed before Schmittgens provided the flash drive to Stange’s counsel on September 28th, 2018. T7, R66 (A76).

Ms. Merta testified that, despite her lawyer’s failings, she absolutely takes responsibility for failing to comply with the TRO. T31, R90 (A100). She wishes she would

have followed through and checked in with Schmittgens more often, though when she did speak with him, he assured her that everything was fine. T31, R90 (A100).

D. First Motion for Contempt

After the flash drive had been returned to Stange’s lawyers, on September 28th, 2018, Stange filed its first motion for contempt for violation of the TRO because the files were not returned to Stange’s lawyers by the date required by the TRO. R3 (A5). The trial court issued a show cause order. R3(A5).

Prior to the evidentiary hearing on the motion for contempt and order to show cause Ms. Merta terminated Schmittgens and retained new counsel, Eric Kayira (“Kayira”). T32, R91 (A101). Kayira inexplicably advised Ms. Merta not to attend the motion for contempt hearing. T32, R91 (A101). After the hearing, the trial court entered a judgment and order of contempt (the “First Order of Contempt”). Ex3, R161.

In the First Order of Contempt, the trial court found that that Ms. Merta intentionally and willfully retained and failed to return all Stange documents in violation of the TRO because not all the files were returned by the deadline set forth in the TRO. Ex3, R161. However, the entire flash drive was turned over before the motion for contempt was filed. R52 (A39). The Court also found that Ms. Merta had continued to interact with Stange-related documents and information on the flash drive and had transferred data to a Mac computer after entry of the TRO. Ex3, R161. However, as stated above, the TRO allowed Ms. Merta to keep the Stange files for clients that had agreed to become Merta clients after she left Stange, and the TRO required that she maintain all the Stange firm data even though

she was required to return the data on the flash drive. Therefore, she had no choice but to copy the flash drive materials to another location to maintain it.

The First Order of Contempt ordered that Ms. Merta produce to Stange's forensic consultant all "personal and business computers, other electronic storage devices, and electronic storage accounts" on or before January 11, 2019. Ex3, R161.

Ms. Merta turned over all such devices, and provided login and security information before the court ordered deadline. T33, R92 (A102). Specifically, Ms. Merta hand-delivered her cell phone, her paralegal's cell phone, her computers and all her other devices to Stange's consultant, Parameter Security, in St. Charles, Missouri on January 10, 2019, a day early. Ms. Merta and her paralegal waited in St. Charles for six hours to get their cell phones back from the consultant. T39-40, R98-99 (A108-09). Ms. Merta did not receive her other electronic devices including her laptop and iPad until ten days later. T40, R99 (A109).

While she was at Parameter Security, Stange's forensic consultant asked Ms. Merta to write out a list of all her passwords and usernames, which she did. T33, R92 (A102). The forensic consultant asked Ms. Merta about two-factor authentication and Ms. Merta informed him that all the codes would be sent to her phone, so he would have the devices he needed to access those accounts and get past the security. T34, R93 (A103). Ms. Merta testified that two-factor authentication is usually a six-to-eight-digit code that is sent to your cell phone just to verify that the person trying to access that account is the rightful owner of the account. T34-35, R83-84 (A93-94).

After her computers were returned to her by the forensic consultant, Ms. Merta changed the passwords on her cloud accounts to make sure her client data was safeguarded. T39, R98 (A108). She believed it would not be appropriate to maintain the same login information after giving it to the forensic consultant. See T39, R98 (A108). She assumed that the forensic consultant had completed its review of her data when her computers and other devices were returned to her. T39, R98 (A108). The First Order of Contempt did not preclude Ms. Merta from changing her passwords after the forensic consultant had finished its work, and neither the forensic consultant, nor anyone else, told Ms. Merta not to change her passwords after she received her devices back. *See* Ex3, R161-68; T40, R99 (A109).

E. Second Motion for Contempt

On February 25, 2019, the Stange firm filed a second motion for contempt and motion to show cause, in which it asserted that, **while Ms. Merta timely turned over her laptops and other devices to Stange’s forensic consultant**, she nevertheless violated the TRO because her computer still contained some of the Stange files. T36, R95 (A105); R37 (A24). However, the TRO—which required Ms. Merta to preserve all Stange data (including those being returned)—was still in effect. *See* Ex2. R159-160.

On March 9, 2019, Ms. Merta filed for protection under Chapter 13 of the U.S. Bankruptcy laws and the automatic bankruptcy stay went into effect. Ex5, R179; R37 (A24). Notwithstanding the automatic stay, on July 9, 2019, the trial court heard evidence on Stange’s motion to show cause. Ex8, R186; R38 (A25). Ms. Merta failed to appear for that evidentiary hearing at the advice of both Kayira and Ms. Merta’s bankruptcy attorney

who were asserting that the automatic bankruptcy stay was still in effect. Ex8, R186; T37, R96 (A106); R38 (A25).

On July 10, 2019, the trial court issued a second order of contempt (“Second Order of Contempt”). Ex9, R187-93; R38 (A25). Once again, the court took adverse inferences against Ms. Merta because she did not attend or present evidence at the contempt hearing. *See* Ex9, R187.

Based on the undisputed testimony by Stange’s forensic consultant, the trial court found that (a) Ms. Merta delivered her laptop and other devices in April 2019, three months later than ordered to do so (even though Stange’s motion stated that Ms. Merta timely turned over her devices before January 11, 2019); (b) Stange’s forensic specialist discovered a Google Drive Cloud account that he had never known about, without valid credentials, and a “Box” account where the password had been changed; and (c) Ms. Merta and her legal assistant were transferring documents to the box account and the cloud account for the purpose of hiding them in advance of another motion for contempt. Ex9, R190; R38 (A25).

Ms. Merta testified that her computer still contained Stange files because she “was under a court order (the TRO) to not delete anything and not to remove anything.” T36, R95 (A105). Therefore, she “just left everything on there until [she] was told otherwise.” T36, R95 (A105). The record does not reveal why the trial court found that Ms. Merta had turned over her devices three months late when Stange’s motion for contempt admitted that she had turned over the devices timely.

Ms. Merta testified that her practice was to preserve client files by backing them up from her computer desktop to the Box account or Google Cloud, but she did not transfer any Stange files to her cloud account. T41, R100 (A110). The trial court made an adverse inference that Ms. Merta had transferred Stange files to the cloud accounts because she did not appear at the contempt hearing to explain that she was transferring only her own client files to the cloud accounts. See Ex9, R187-193. The trial court found that Ms. Merta had violated a court order by changing her passwords to prevent the forensic consultant from accessing her cloud accounts even though there was no such order preventing her from changing any passwords after the forensic consultant returned her devices to her. *See* Ex3, R161-68.

F. Confinement in St. Louis County Jail

The trial court sentenced Ms. Merta to 48 hours in the Saint Louis County Department of Justice Services and issued a warrant for her arrest. R39 (A26). Subsequent warrants were issued because the trial court lacked jurisdiction and violated the bankruptcy automatic stay when it issued the original warrant. R39 (A26).

During the time when the warrant for Ms. Merta's arrest had been quashed, Ms. Merta was handcuffed and nearly arrested while representing a client at a municipal court traffic docket. T45, R104 (A114). She put her lawyer on speakerphone to convince the officer to release her. T45, R104 (A114).

After the bankruptcy court issued an order remanding the case to state court on July 17, 2019, Ms. Merta was served with another warrant. T46, R105 (A115). The multiple warrants issued by the trial court erroneously stated that Ms. Merta was in "criminal

contempt.” *See* Ex9, R187-193; Ex10, R94-96; Ex11, R97-98; Ex16, R206-08; T42-43, R101-102 (A111-12). However, the contempt orders issued by the trial court did not mention criminal contempt. To properly charge a person with criminal contempt that does not occur in the court’s presence, the court had to issue a show cause order, or order of arrest stating the essential facts constituting the criminal contempt charged and describe it as criminal contempt. Rule 36.01(b). This procedure was not followed by the trial court. The Second Order of Contempt did not mention criminal contempt. Ex9, R189.

Based on the last warrant for criminal contempt issued by the trial court, Ms. Merta was handcuffed, marched through the courthouse, taken across the skywalk down the elevator and to booking and processing at St. Louis County jail. T46, R105 (A115). She waited 13 hours to be processed. She then went through booking and processing and was brought into holding with six other inmates. T46, R105 (A115). Her mugshot and fingerprints were taken. T47, R106 (A116). The first night, she slept on a hard concrete bench. T47, R106 (A116). No pillows or blankets were provided. T47, R106 (A116). Ms. Merta and the other inmates used frozen sack lunches of bologna sandwiches and Cheeto’s as pillows. T47, R106 (A116).

She was woken by jail staff at six o’clock the next morning for further processing. T47, R106 (A116). Ms. Merta was forced to strip down and take a shower. T47, R106 (A116). She was then strip-searched to show she was not carrying contraband in her body. T47, R106 (A116). Ms. Merta knew that several inmates had recently died in the St. Louis County Jail, and she was terrified that something might happen to her since she has epilepsy. T47, R106 (A116).

At that point, Ms. Merta chose to focus her time in jail on speaking to the other inmates and taking notes on everything she had observed the day before in the holding cell, *i.e.*, the process of getting processed, and everything she could observe from food to bedding to menstruation products and the jail's library. Ms. Merta was placed in a cell with an inmate who was going through drug court. T47, R106 (A116). Ms. Merta took notes on what her cell mate told her about drug court and its various failures. T48, R107 (A117). She spent time talking with two women who were waiting for six or eight weeks to be extradited to other states, and no one had informed those other states that the women were being held in Missouri. T48, R107 (A117). Ms. Merta made calls after she was released from jail helping both women make it to their home states where they were immediately released. T48, R107 (A117).

Ms. Merta subsequently met with Sam Page, the St. Louis County Executive, to share her observations while lobbying for better services. T48, R107 (A117); R48 (A35). As a result of her efforts, previously costly period products for women were offered free of charge and produce contracts and textile contracts were changed in favor of better quality of food and bedding. T49, R108 (A118); R48 (A35). The following holiday season, Ms. Merta organized a book drive for the jail, collecting about a thousand books for the jail library. T50, R109 (A119); R48 (A35).

ARGUMENT

I. The Court should suspend Ms. Merta's license, stay the suspension, and place Ms. Merta on probation because probation is reasonable under the factual circumstances and applicable legal standards.

This Point addresses Points I and II in Informant's Brief.

This action arose because a young lawyer used bad judgment when she left the Stange law firm. She inappropriately took client files for clients that did not give her permission to take their files, and she took other Stange documents that she should not have taken without permission. Her decisions, early in her career were wrong. She has shown contrition for those mistakes, and she has grown as a lawyer in the six years since she left the Stange firm.

After she left the Stange firm, the firm went after her with a vengeance. They hired a high-powered law firm to sue her in St. Louis County Circuit Court for money damages and for return of the files. In that lawsuit, Ms. Merta was poorly represented by two other inexperienced lawyers. One of those lawyers, Mr. Kayira, was later disbarred by this Court. *See In re Kayira*, 614 S.W.3d 530 (Mo banc 2021). As a result of the way she was defended in that lawsuit, Ms. Merta was held in contempt of court twice, she was jailed for two days, she was forced to file for bankruptcy protection, and she paid a substantial amount of money to the Stange firm to settle all disputes with the firm and gave up her own claims against the firm.

Stange wrote a letter to its clients stating that none of their confidential information was at risk of being disclosed to third parties, and Ms. Merta was not intending to use their information for anyone's personal or financial disadvantage. R49 (A36). There is no evidence that a client was harmed or that any client was concerned about being harmed by this incident. R49 (A36).

Despite the poor representation by her former lawyers, Ms. Merta has taken full responsibility for all that resulted from the underlying lawsuit. She fully cooperated with

the OCDC in its investigation and throughout this proceeding. She is extremely remorseful, and she agreed to accept a stayed suspension of her license. She realizes that she violated the ethics rules when she left Stange by taking the files, she realizes that she is responsible for the failure to follow the orders issued by the St. Louis County Circuit court, even if bad legal representation caused her to be found in contempt of court.

Further, apart from her stint working at Stange, Ms. Merta devoted her entire nascent legal career to public service. R47 (A34). After law school, she ran for an alderman position. Her first legal job was with the Arch City Defenders, representing homeless and low-income clients in criminal and family law matters. R47 (A34). After leaving Stange, Ms. Merta opened Lotus Law and returned to serving vulnerable populations that would not otherwise have access to legal services. R47 (A34).

Ms. Merta's competency to practice law has not been questioned. R52 (A39). She has not been the subject of any prior discipline, and there have been no other incidents of her failing to comply with Court orders or of any other ethical violations in the six years since she left the Stange firm. R46 (A33).

“The purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the profession. Those twin purposes may be achieved both directly, by removing a person from the practice of law, and indirectly, by imposing a sanction which serves to deter other members of the Bar from engaging in similar conduct.”

In re Kazanas, 96 S.W.3d 803, 807-08 (Mo. banc 2003).

Given the mitigating factors discussed below, a stayed suspension of her license is the appropriate sanction in this case.

A. Probation is the most appropriate form of discipline

“This Court determines appropriate discipline by considering its prior cases and the American Bar Association’s Standards for Imposing Lawyer Sanctions (1992) (“ABA Standards”). *In re Gardner*, 565 S.W.3d 670, 677 (Mo. banc 2019). After finding a lawyer has committed professional misconduct, this Court considers four primary factors when applying ABA Standard 3.0 in imposing sanctions: “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” *In re Belz*, 258 S.W.3d 38, 42 (Mo. banc 2008). These four factors provide a framework for all disciplinary matters, although other ABA Standards can also “provide guidance as appropriate for specific types of misconduct.” *Id.*

1. Duty violated

Ms. Merta stipulated that she violated Rule 4-8.4(c) (A142-43) by misappropriating confidential information belonging to the Stange Law Firm and by removing client files without the knowledge or consent of all clients whose files were taken. R42 (A29). Ms. Merta now understands that her failure to obtain client consent before taking the files was unethical and created problems. T26, R85 (A95).

Regarding Ms. Merta’s violation of Rule 4-3.4(c) (A140), an attorney violates this rule when they knowingly violate a trial court’s order. *In re Gardner*, 565 S.W.3d at 677. In that case, Mr. Gardner violated multiple ethics provisions, including a specific court order prohibiting Gardner from taking his full fee for work from the probate estate. This Court determined that a stayed suspension was the appropriate discipline. *Id.* at 680. Unlike

Ms. Merta, Mr. Gardner had substantial experience as an attorney, which is a minor aggravating factor, and, he had agreed to one prior admonition years before. On the other hand, as Informant noted in its brief, Ms. Merta shares many of the mitigating factors identified in the Gardner decision, including that Ms. Merta is remorseful, has acknowledged her wrongdoing, has settled all disputes with Stange, and there is no evidence Ms. Merta intended to lure Stange clients for whom she had not been the primary attorney. *Id.* at 679-80.

Ms. Merta, through her attorney, consented to the TRO, which required her to return all Stange documents and data by February 20, 2018, and to preserve all data until further order of the trial court or agreement of the parties. Ex2, R159-60. Ms. Merta, also through her attorney, failed to turn over the USB flash drive until September 28, 2018. T7, R66 (A76). As discussed below, Ms. Merta relied to her detriment on her retained counsel to manage the production of information to Stange's counsel in compliance with the TRO. T31, R90 (A100).

Ms. Merta's first lawyer, Schmittgens, signed the TRO when Ms. Merta was not present and without giving Ms. Merta an opportunity to see the document before Schmittgens signed it. T27-28, R86-87 (A96-97). The same day Ms. Merta received a copy of the TRO from Schmittgens, she hand-delivered the Flash Drive to him. T30, R89 (A99). Ms. Merta testified that she trusted her attorney to follow the court order because she gave him what he needed to follow through. T30, R89 (A99). Ms. Merta testified that she wished she would have followed through and checked in with Schmittgens more often, but when she did speak with him, he assured her that everything was fine. T31, R90 (A100).

Ultimately, Schmittgens waited seven months before providing the flash drive to Stange’s counsel despite multiple requests made by Stange and a motion to compel. R163.

The TRO contains multiple contradictions. Ex2, R159-60; T29, R88 (A98). The TRO required Ms. Merta to “return all of the Stange Property to the Stange Firm” while also preserving “all electronic, computer and paper records (including those being returned) constituting or containing SLF current or former client-related files and/or information . . .” R35 (A22). The TRO permitted Ms. Merta to keep documents related to clients who had retained Ms. Merta and terminated their relationship with Stange, but also enjoined Ms. Merta from “accessing, viewing and/or using” any of the files, including the files pertaining to the client(s) that had decided to retain Ms. Merta as counsel.” *See* R35 36 (A22-23).

Ms. Merta relied to her detriment on advice from her lawyers to not attend evidentiary hearings on motions for contempt. Prior to the hearing on Stange’s first motion for contempt, Ms. Merta terminated Schmittgens and hired Kayira. T32, R91 (A101). Inexplicably, Kayira advised her not to attend the hearing. T32, R91 (A101). As a result, the trial court took adverse inferences against Ms. Merta including that Ms. Merta intentionally and willfully retained and failed to return all Stange documents in violation of the TRO.

If Ms. Merta had testified, she could have informed the trial court that she gave the flash drive to Schmittgens the day the TRO was entered. T30, R89 (A99). Ms. Merta could have explained that she was continuing to retain Stange documents on her computer because she was required to do under the TRO. Ex9, R189. She likewise could have

explained that she was not “transferring documents to the box account and the cloud account for the purpose of hiding them in advance of another motion for contempt,” as the trial court inferred, but she was simply backing up her own files to the cloud in the normal course of business. *See* Ex9, R190; T11-12, 41, R70-71, 100 (A80-81, 110). Finally, Ms. Merta could have explained that no one told her not to change her passwords after she received her devices back from Stange’s forensic consultant. *See* Ex3, R161-68; T40, R99 (A109).

Finally, regarding Rule 4-8.4(d) (A143), a lawyer’s failure to be candid and compliant with the trial court can hinder the administration of justice and violate Rule 4-8.4(d). *In re Krigel*, 480 S.W.3d 294, 300 (Mo. banc 2016). In that case, Mr. Krigel signed and submitted documents to the court stating that the birth mother in an adoption proceeding did not know of any other person who claimed to have custody or visitation rights, when Mr. Krigel knew the name, address, and attorney for the birth father, who had indicated he was opposed to adoption. *Id.* at 300. Thus, Mr. Krigel knew material information was withheld from the trial court, and he took no remedial action during any of the proceedings, and thus thwarted the opportunity for birth father to assert his parental rights. *Id.* at 300-02. Mr. Krigel thereby also violated the Rules by offering evidence he knew to be false (Rule 4-3.3(a)(3)) and making a false statement of material fact or law to a third person. Rule 4-4.1(a). This Court determined that a stayed suspension was the appropriate discipline. *Id.* at 301. With respect to aggravating factors, Mr. Krigel committed multiple offenses and failed to grasp the severity of these charges. *Id.* In

mitigation, Mr. Krigel had been a practicing attorney for more than thirty years with no disciplinary history prior to this incident. *Id.*

Unlike in *In re Krigel*, Ms. Merta has shown deep remorse and grasps the severity of her misconduct. Like Mr. Krigel, Ms. Merta's age (in this case her inexperience) and lack of other disciplinary history are mitigating factors. Ms. Merta's lawyer returned the Flash Drive containing all misappropriated data before the first motion for contempt. R52 (A39). No additional data was recovered as a result of Stange performing a forensic analysis on all Ms. Merta's personal and business computers and electronic devices. Whereas Mr. Krigel was dishonest with the court, there is no claim that Ms. Merta ever made a misrepresentation to the Court. Thus, this Court's decision in *In re Krigel* supports a stayed suspension for Ms. Merta.

2. Mental state

In the stipulated Conclusions of Law before the DHP, Ms. Merta stipulated that her mental state with regard to her violation of Rule 4-3.4(c) (A140) was intentional. R44 (A31). In support of this stipulated mental state, the parties noted that the trial court twice found that Ms. Merta "intentionally, willfully, and contumaciously failed to comply with the court's temporary restraining order (TRO) of February 16, 2018, to return the misappropriated data." R44 (A31). Ms. Merta has taken full responsibility for her failure to comply with the trial court's orders. T31, R90 (A100). She recognizes that complying with the court's order was ultimately her responsibility. T31, R90 (A100). While she intentionally took the files from the Stange firm without permission, her purpose was to be

able to continue to represent clients who chose to stay with her. T24, R83 (A93). She did not have a malicious intent.

Ms. Merta's stipulated mental state with regard to her conduct in failing to comply with the trial court's orders, stands in stark contrast with the case involving her second attorney in the Underling Lawsuit, Mr. Eric Kayira. In that case, Mr. Kayira's misappropriation was not an isolated incident but rather was part of a long pattern of behavior which included misappropriating client funds to pay his residential landlord and to make a down payment on a car; using client funds for other personal and firm expenses; routinely depleting client funds to pay other clients; and treating some client payments as "advance fees" before he had earned the funds. *In re Kayira*, 614 S.W.3d 530, 538 (Mo. 2021). This Court reasoned that Mr. Kayira's conduct belies any claim that Mr. Kayira's actions, including using funds he knew to be client funds to pay for personal and firm expenses, were undertaken without knowledge of their wrongfulness. *Id.*

3. Potential or actual injury

Under ABA Standard 6.2, whether disbarment or suspension is appropriate depends on (1) whether the lawyer violated a rule with the intent to obtain a benefit for the lawyer or another, and (2) whether the injury to a party or interference with the court (or potential injury or interference) is "serious." *See* ABA Standard 6.2.

Here, there was no evidence that Ms. Merta maintained the misappropriated data to "obtain a benefit for the lawyer." ABA Standard 6.21. Specifically, there was no evidence that Ms. Merta intended to use any of the data to lure away firm clients for whom she did no work. R45 (A32).

Ms. Merta's conduct did not result in any injury or the potential injury to clients. Stange informed its clients that none of their confidential information was at risk of being disclosed to third parties, and that Ms. Merta was not intending to use their information for anyone's personal or financial disadvantage. R49 (A36). In fact, Ms. Merta testified that the reason she took data belonging to Stange was so that she could protect those clients which would (and did) remain with her following her resignation. T22-24, R81-83 (A91-93). Thus, there is no evidence that a client was harmed or that any client was concerned about being harmed by this incident. R49 (A36).

The Stange firm did not lose any data and Ms. Merta did not believe Stange would lose any data when she wiped her devices, because Stange saved all its data to a cloud backup. T22, R81 (A91). Further, Ms. Merta believed she had taken only data she needed to protect her clients,⁴ and within 48 hours of her leaving the firm, all but two or three of her clients provided written permission to remain with Ms. Merta at her new practice. T26, R85 (A95).

4. Aggravating or mitigating circumstances

An aggravating factor in this case is the presence of "multiple offenses." *See* ABA Standard 9.22(d). Ms. Merta asserts that the significant mitigation, described below, greatly outweigh any aggravating factors.

⁴ Ms. Merta testified that she was unaware she downloaded additional firm and client information. T24-25, R83-84 (A93-94). Specifically, she was under the impression that what she had saved on that flash drive were just the templates. She did not know that the firm also stored other items in the electronic file named "templates." T25, R84 (A94).

Inexperience in the practice of law (ABA Standard 9.32 (f)): At the time of the events related to this charge, Ms. Merta was relatively inexperienced. R46 (A33). Ms. Merta graduated St. Louis University Law School in 2014. R46 (A33). At the time she left the Stange Firm, she had been practicing law for about three years. R46 (A33).

Imposition of other penalties or sanctions (ABA Standard 9.32(k)): Ms. Merta has already been severely sanctioned for her failures to comply with the Court orders. She spent two days in jail. Further, in the arrest warrants (but not the contempt orders) the trial court found that Ms. Merta was in “criminal contempt” of the court’s orders. Ms. Merta must deal with the consequences of this finding.

This Court has explained that there are two classes of contempt—civil and criminal:

Civil contempt is intended to benefit a party for whom an order, judgment, or decree was entered; its purpose is to coerce compliance with the relief granted. A civil contemnor has the power to terminate punishment by complying with the order of court. Criminal contempt is punitive in nature and acts to protect, preserve, and vindicate the authority and dignity of the judicial system and to deter future defiance. The distinction between criminal and civil contempt is reflected in the content of the judgment, whether the remedy is coercive or punitive.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 578 (Mo. 1994) (internal citations omitted). As discussed above, the appropriate procedures were not followed to hold Ms. Merta in criminal contempt and the Orders of contempt did not state that she was held in criminal contempt. *See* Rule 36.01(b). Nevertheless, she was punished for the contempt and there was nothing she could do to comply with the Court orders at the time she was taken to jail.

Ms. Merta ultimately settled all claims with the complainant, Stange, and paid it a substantial amount of money, which was a hardship for her, given her lack of resources. R46 (A33). She also filed bankruptcy as a result of the underlying case. R46 (A33). Her reputation has already been severely damaged. Tr. 54-55, R. 113-14 (A123-24).

Full and free disclosure to the disciplinary board or cooperative attitude toward the proceedings (ABA Standard 9.32(e)): Ms. Merta has made full and free disclosure to the OCDC, has hired counsel to defend her in this proceeding and has been cooperative in resolving this matter. R46 (A33).

Absence of prior disciplinary record ABA Standard 9.32(a): Ms. Merta has no prior disciplinary record. R46 (A33).

Character or reputation ABA Standard 9.32(g): Except for her 18-month stint working for the Stange Firm, Ms. Merta has devoted her legal career to public service. R47 (A34). After law school, she ran for an alderman position in the 7th Ward of the City of St. Louis. R47 (A34). When she was not successful in her campaign, she began working for Arch City Defenders in 2015 representing homeless and low-income clients in criminal and family law matters. R47 (A34). She worked there until January 2016 when she was laid off for budgetary reasons. R47 (A34).

After leaving Stange, Ms. Merta opened her own firm, Lotus Law & Legal Services, LLC. R47 (A34). Initially, she handled criminal and family court matters. R47 (A34). Most of those clients were referred to her by Arch City Defenders and Legal Services of Eastern Missouri. R47 (A34). Those agencies referred clients to Ms. Merta who did not meet the agencies' income requirements because they knew that Ms. Merta would work with them

on fees and had a low initial retainer requirement. R47 (A34). Most of her clients cannot afford to pay her very much for her services, and many times she does not get paid. R47 (A34).

Over the course of her career, Ms. Merta has served the community as a public servant and community activist. R47 (A34). She has spoken at events for the St. Louis Young Democrats and for the organization, Show Me Integrity, on First Amendment issues, including protester rights, Sunshine laws, and the Freedom of Information Act. R48 (A35). She was a founding member of both the Young Friends of Operation Brightside St. Louis and the St. Louis chapter of the Red Shoe Society for Ronald McDonald House Charities. R48 (A35). She is also the Editor-in-Chief for the St. Louis Observer, a newsletter committed to expanding and investing in coverage of the fight for police and prison reform. R48 (A35). She has also been a board member for Young Friends of Missouri Botanical Garden. R48 (A35).

Finally, Ms. Merta used the two days she spent in jail to assess the inadequate conditions for inmates, and after her release, she used her observations to lobby for improved conditions. R48 (A35). She subsequently met with Sam Page, the St. Louis County Executive, to share her observations while lobbying for better services. R48 (A35). She was able to obtain more availability of feminine products for inhabitants of the jail and, the following holiday season, she organized a book drive for the jail. R48 (A35). Three character witnesses testified on Ms. Merta's behalf. *See* T63, R122 (A132).

Remorse (ABA Standard 9.32(1)): Ms. Merta is very remorseful about the events that occurred at Stange and during the subsequent litigation. R48 (A35). She understands

that she did not handle matters correctly and she wishes that she had handled matters pursuant to the ethical rules. R48 (A35). She has learned from her mistakes, and she is determined to not repeat her mistakes. Ms. Merta takes full responsibility for what happened. T56, R115 (A125). Specifically, she regrets the way that she left Stange; she regrets not following up with her attorney; and she regrets not getting competent counsel in the first place. T56, R115 (A125). Ms. Merta took responsibility for all her missteps. T56, R115 (A125).

Additional factors that do not necessarily fall within the ABA standards but may be considered in mitigation include the following:

- When Ms. Merta left Stange and deleted data from her firm-issued laptop and cell phone, all client file material was preserved on the Stange Firm's cloud storage, so no client data was lost or destroyed. R49 (A36). She deleted the data on her firm-issued phone and laptop for fear that Stange's managing partner would access her personal social media and email accounts. T22, R81 (A91).
- Within 48 hours of leaving Stange, almost all Ms. Merta's clients provided written permission to remain with Ms. Merta at her new practice. T26, R85 (A95). Moreover, in the three weeks that followed her departure, Ms. Merta had depositions scheduled, upcoming court setting including an order of protection hearing, and numerous settlement conferences for which she need her files to prepare. T23, R82 (A92). Ms. Merta was able to continue to represent those clients without interruption. R49 (A36).

- Stange informed its clients that none of their confidential information was at risk of being disclosed to third parties, and Ms. Merta was not intending to use their information for anyone's personal or financial disadvantage. R49 (A36). There is no evidence that a client was harmed or that any client was concerned about being harmed by this incident. R49 (A36).
- Ms. Merta returned all the misappropriated data before Stange filed its first motion for contempt and before the trial court entered its first motion for contempt. R52 (A39).
- Ms. Merta's competency to practice law has not been questioned.
- Ms. Merta, and the work she has done for underserved clients, have already suffered because of the negative publicity caused by the Underlying Lawsuit, the trial court's finding of contempt, and the subsequent warrant for her arrest. R49 (A36). As a result of that publicity, at least one federal judge stated in an order that he was removing Ms. Merta from an appointed case. R49-50 (A36-37). Ms. Merta has not been appointed to a federal case since that time. R50 (A37). As a result of the negative publicity, the Family Law Section of the Missouri Bar removed Ms. Merta as a speaker on the panel of the annual conference in 2019 and has since stopped asking her to summarize case law for their bulletin and stopped asking her to speak at their conferences. R50. It is likely that further negative publicity from any public sanction entered as a result of this proceeding will further hamper Ms. Merta's ability to represent underserved clients and will be a detriment to people in that community. R50 (A37).

- Finally, an actual suspension of Ms. Merta’s license or disbarment will cause great harm to the underserved clients and potential clients she represents because it is unlikely they will find affordable counsel elsewhere. R50 (A37). Those clients do not qualify to be represented by agencies such Arch City Defenders or Legal Services, but they cannot afford to pay fees that are charged by lawyers under traditional fees agreements. R50 (A37). There are very few lawyers who are willing to represent clients under the fee arrangements that Ms. Merta accepts. R50 (A37).

In sum, probation is the most appropriate discipline given the nature of Ms. Merta’s ethical violations, Ms. Merta’s desire to protect her clients, the lack of actual or potential injury to clients, and the existence of significant mitigation. Ms. Merta takes full responsibility for the prolonged and unnecessary proceedings in the Underlying Case caused in large part by extremely poor legal representation. Ms. Merta has already suffered greatly both personally and professionally resulting from Stange’s motions for contempt despite the fact that all misappropriated data was returned to Stange before Stange filed its first motion for contempt. Nonetheless, Ms. Merta has always made the best of her circumstances and hopes to rebound from this entire episode.

B. Ms. Merta is eligible for probation

Ms. Merta is eligible for probation. “This Court adheres to a practice of applying progressive discipline when imposing sanctions on attorneys who commit misconduct.” *In re Forck*, 418 S.W.3d 437, 444 (Mo. banc 2014). Progressive discipline includes consideration of probation. An attorney is eligible for probation if the attorney: (1) is unlikely to harm the public during the probationary period and can be supervised

adequately; (2) is able to perform legal services and practice law without causing the courts or profession to fall into disrepute; and (3) has not committed acts warranting disbarment. Rule 5.225(a)(2)(A-C).⁵

This Court considered eligibility for probation in its recent decision in *In re Neill*, 2024 WL 98400, at *4 (Mo. banc Jan. 9, 2024). This Court found that Mr. Neill was not eligible for probation because his conduct, including his sexual harassment of a client, constituted “acts warranting disbarment[.]” Specifically, Mr. Neill acknowledged that a sexual encounter took place at his office with a client with whom he did not have a consensual sexual relationship prior to the commencement of an attorney-client relationship. *Id.* at *1-2. Criminal charges were filed, and Mr. Neill was found not guilty after a bench trial. *Id.* at *1. Few Supreme Court decisions have addressed probation eligibility. *Id.* at *4. This Court distinguished *In re Coleman*, 295 S.W.3d 857 (Mo. banc 2009) and *In re Wiles*, 107 S.W.3d 228, 229-30 (Mo. banc 2003), in which this Court sanctioned the lawyer to probation, because the misconduct at issue in those cases did not involve sexual harassment under Rule 4-4.8(g).

This Court concluded that ABA Standard 4.31 sets out the baseline or presumptive discipline for Mr. Neill’s misconduct. Under ABA Standard 4.31, disbarment is appropriate

⁵ Rule 5.225(a)(2)(C) applies in Ms. Merta’s case because the information was filed before January 1, 2023. *See* Rule 5.34. Effective January 1, 2023, Rule 5.225(a)(2)(C) was repealed and replaced with Rule 5.175. Rule 5.175(a) clarifies that mitigating factors do not impact whether a lawyer has committed “acts warranting disbarment[.]” rendering a lawyer ineligible for probation. *See In re Neill*, 2024 WL 98400, at *4, n.2 (Mo. Jan. 9, 2024).

“when a lawyer, without the informed consent of client(s): (a) engages in representation of a client knowing that the lawyer’s interests are adverse to the client’s with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client[.]” *Id.* at *5. This Court reasoned that it would be absurd to conclude disbarment is the baseline sanction for knowingly converting client funds without concluding disbarment is the baseline or presumptive sanction for the gross personal misconduct of sexual harassment of a client. *Id.* at *6.

In this case, suspension is the appropriate baseline sanction for Ms. Merta. (*See* Informant’s Brief at 42.) As discussed above, under ABA Standard 6.2, disbarment is appropriate only when a lawyer (1) intends to obtain a benefit for the lawyer or another and (2) causes serious or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding. Ms. Merta did not intend to use client information for anyone’s personal or financial disadvantage and there is no evidence that a client was harmed or that any client was concerned about being harmed by Ms. Merta’s actions. R49 (A36). Therefore, since suspension is the appropriate baseline sanction under ABA Standard 6.2, Ms. Merta did not commit acts warranting disbarment.

Moreover, there is no indication that Ms. Merta is likely to harm the public. *See generally* R1-281; (Informant’s Brief at 44). Ms. Merta’s competency to practice law has not been questioned and she has devoted her legal career to helping underserved populations.

Finally, if Ms. Merta is allowed to continue to practice law, the courts and profession will not fall into disrepute. In fact, Ms. Merta’s representation of low-income individuals

improves the reputation of the courts and legal system. The reputation of the courts and legal profession suffers when underserved “gap populations”⁶ lack access to the legal services. Except for her time with Stange, Ms. Merta’s entire legal career has involved public interest work serving vulnerable populations who would not otherwise be able to afford legal services. Incredibly, Ms. Merta used the 48 hours she served in jail to improve the criminal justice system in St. Louis County. R33 (A20).

For all the reasons stated herein, Ms. Merta’s conduct does not warrant disbarment. As such, she is eligible for probation.

CONCLUSION

Ms. Merta is an excellent candidate for probation. Probation strikes the correct balance of deterrence of similar misconduct by other lawyers and recognition of the extensive mitigation factors present in this case. Ms. Merta requests this Court to affirm the Disciplinary Panel’s findings and Order and grant all other just and appropriate relief.

⁶ Ms. Merta described “gap populations” as people who “make too much income to qualify for pro bono legal services, but they don't make enough to hire the high dollar firms for family and criminal matters.” T18-19, R77-78 (A87-88).

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND
CERTIFICATION UNDER RULE 55.03(A)**

I hereby certify that a copy of Respondent's Brief was filed by the Court's electronic filing system on February 5, 2024, for service electronically on all counsel of record. Under Rule 55.03(a), the undersigned further certifies that he signed an original of this pleading and that an original of this pleading shall be maintained for a period not less than the maximum allowable time to complete the appellate process.

/s/ Steven H. Schwartz

Steven H. Schwartz, #36436

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06(c) of the Missouri Rules of Civil Procedure that:

1. Respondent's Brief includes the information required by Rule 55.03;
2. Respondent's Brief complies with the limitations contained in Rule 84.06;
3. Respondent's Brief, excluding cover page, this certificate required by Rule 84.06(c), and signature block, contains 8,744 words, as determined by the word-count tool contained in the Microsoft Word 365 software with which this Respondent's Brief was prepared; and
4. Respondent's Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

/s/ Steven H. Schwartz

Steven H. Schwartz, #36436